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Opinion following order vacating prior opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN BERNARD JEFFERSON,

Defendant and Appellant.

B281279

(Los Angeles County
Super. Ct. No. MA069441)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed and remanded with directions.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Kevin Bernard Jefferson was convicted by a jury of two counts of second degree robbery. (Pen. Code, § 212.5, subd. (c).)¹ Prior to sentencing, the People dismissed five prior prison term allegations on their own motion and defendant admitted a prior strike conviction.² The trial court denied defendant's *Romero*³ motion. The court then sentenced defendant to 11 years in state prison on count 1—which included a five-year enhancement for a prior serious felony conviction—and to three years on count 2, with the latter to run concurrent with the sentence on count 1. On appeal, defendant contends the trial court abused its discretion in refusing to dismiss his prior strike conviction. We remand the matter for resentencing pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (SB 1393), which grants courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes. We affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On September 1, 2016, Davin Rosenfeld and Monique Olvera were working as loss prevention officers at a Walmart store in the city of Lancaster, California. At about 3:30 p.m. that day, Olvera was in the store's loss prevention office monitoring video surveillance cameras of the store. On one of the monitors

¹ All undesignated statutory references are to the Penal Code.

² The conviction was a prior serious or violent felony as defined in sections 667, subdivision (d), and 1170.12, subdivision (b).

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

she saw defendant in the men's department "stuffing" clothes into a backpack. Olvera told Rosenfeld what she had seen. Defendant left the men's department and proceeded to the shoe department where Olvera and Rosenfeld observed defendant remove his shoes, put them in a backpack, and place new boots from the men's department on his feet. The backpack had been acquired by defendant at another location in the store, but the loss prevention agents had not seen defendant take it. Defendant proceeded to the store's garden center exit, passed by the manned cash registers and left the premises without paying for any of the items.

Olvera left her post, reached defendant when he was a few feet past the garden center exit, identified herself as a Walmart loss prevention agent, and said she wanted to talk with him about the merchandise for which he had not paid. Defendant responded by stating, "You don't know what you're talking about."

Rosenfeld had arrived at the same location a few seconds after Olvera had stopped defendant. He also identified himself as a loss prevention agent for Walmart. Rosenfeld asked defendant to return the merchandise and to come inside to do some paperwork, after which he could be on his way. Rosenfeld testified that Walmart was only "going to give him restitution through the store, instead of . . . pressing charges on him."

Defendant then turned toward Rosenfeld, got within an inch of his face and began to "bob and weave" with his fists balled up by his sides. He leaned toward Rosenfeld, and with his fists balled up like he wanted to punch the loss prevention agent, yelled, "I'll f**k you up. I'm a Crip. I didn't steal s**t." Rosenfeld and Olvera each became fearful and each took

defendant's words as a serious threat. Olvera told Rosenfeld to back up because she did not know if defendant had a weapon or if defendant would carry out his verbal threat. Rosenfeld backed up and told defendant he was going to call the sheriff. Defendant then said, "I don't give a f**k. The cops aren't gonna do s**t."

Rosenfeld called the Lancaster station of the Los Angeles County Sheriff's Department. Defendant ran from the scene with the backpack containing the clothes and wearing the boots, all of which he had taken from the Walmart. He then jumped over a wall into an apartment complex. While running, defendant threw up his arms and hands, appearing to make gang signs with his fingers. Video surveillance of the encounter was played for the jury.

In his telephone report to the 911 operator, which was played for the jury, Rosenfeld stated that "A guy tried to fight me. He was a shoplifter . . . claiming he is a '[C]rip.'" Olvera said during this call that "[H]e was ballin' up his fists."

Walmart policy is that a loss prevention agent is not to put his or her hands on a person suspected of shoplifting unless the person strikes the Walmart loss prevention agent or another agent, or unless there is immediate danger of being harmed by the suspect, or to direct the suspect to a location.

In his defense, defendant elicited testimony from the sheriff's deputy who interviewed Rosenfeld that the latter had not told the deputy at the time of his interview that defendant had thrown gang signs as he ran from the loss prevention agents. The same deputy testified that when he interviewed Olvera, she did not state that defendant had said he was a member of a gang, nor did she report that he flashed gang signs as he ran. The deputy did not make any determination that defendant was, or

was not, a member of a gang during the course of his investigation.

Following the jury's verdict and prior to sentencing, defendant filed a motion to strike his prior strike conviction pursuant to section 1385 and *Romero*. The People opposed the motion. At the sentencing hearing, defendant's counsel argued that although defendant had been in and out of custody several times following his 1995 strike conviction for robbery, those offenses were nonviolent and theft-related, and his two violent misdemeanors predated that conviction by several years. The court denied the motion and in sentencing defendant to a total of 11 years in state prison, the trial court imposed the midterm of three years on count 1, doubled pursuant to the "Three Strikes" law, and a consecutive sentence of five years pursuant to section 667, subdivision (a)(1). The trial court imposed a concurrent three-year term on count 2.

DISCUSSION

I. The Court Did Not Abuse Its Discretion When It Denied Defendant's *Romero* Motion

Defendant contends that the trial court abused its discretion when it denied his motion to strike his prior strike conviction pursuant to section 1385 and *Romero*. We disagree.

We review a trial court's ruling on a *Romero* motion under the deferential abuse of discretion standard. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) A trial court is "presumed to have acted to achieve legitimate sentencing objectives" and the decision to impose a particular sentence will not be set aside unless an affirmative showing is made that the sentence is irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377.) "[A] trial court does not abuse its discretion unless its

decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.)

In exercising its discretion whether to strike a prior strike allegation, the court considers various factors, including the nature and circumstances of the defendant’s present felonies and prior convictions, the defendant’s background, character and prospects, and whether the defendant may properly be deemed outside the spirit of the Three Strikes law. (*People v. Williams, supra*, 17 Cal.4th at p. 161; *People v. Philpot* (2004) 122 Cal.App.4th 893, 905.)

Defendant acknowledges these cases set out the principles which the trial court was to apply, arguing the trial court failed to do so and instead focused on his criminal history and ignored that “only three of [defendant’s nine] felony convictions were incurred after [his] strike [conviction],” and that these convictions were eligible for reduction to misdemeanors under Proposition 47, citing sections 496, subdivision (a), 666, and 1170.18, subdivision (f). Defendant also argues that even had his motion to strike been granted, he would nevertheless serve a significantly longer term than he has served in the last 20 years.

In opposing the *Romero* motion, the People wrote in their opposition memorandum that in the crime leading to defendant’s prior strike conviction, he had brandished a screwdriver at the Best Buy store employee who confronted him after he had stolen a CD from that store.

In reaching its sentencing determination, the trial court reviewed the history of defendant's convictions, starting in 1987. The court noted the similarity in their facts, including the commonality of the threats of harm made both in the present offenses and in defendant's prior robbery convictions. The court observed that the current offenses escalated to "*Estes*" robberies when the defendant was confronted by the loss prevention agents.⁴ The court pointed out that for each crime, what had been a nonviolent theft had escalated to a robbery based on defendant escalating the crime by threatening to use force and instilling fear immediately upon being confronted.

The court also noted there were other crimes of violence in defendant's past and that two of defendant's 1988 misdemeanor convictions involved violence.

Before concluding its analysis, the court also found significant that following the prior strike conviction, defendant had three additional felony convictions for which he had served prison sentences as well as two misdemeanor convictions.

Following this review and noting the defendant was now 49 years of age, the court declined to exercise its discretion to dismiss the prior strike. In doing so, the court stated: "Looking at the totality of the circumstances, . . . the extent of his criminal history, the nature of the current conduct that resulted in the two [present] robbery convictions, the court does not believe that the defendant is outside the purpose or scope of the Three-Strikes law sentencing scheme. The court does not believe that a second strike sentence would be disproportionate to the nature of the violation."

⁴ *People v. Estes* (1983) 147 Cal.App.3d 23.

Having reviewed the record in this matter, we determine the trial court did not abuse its discretion in denying defendant's *Romero* motion. In committing the crimes of which defendant was convicted in this case, he responded to the two loss prevention agents by denial and by threatening conduct and threatening words, placing the two loss prevention agents in fear for their personal safety. Defendant also made a specific threat directed at one of them, threatening to "f**k up" Rosenfeld. Defendant's extensive criminal history, spanning three decades, and his repetition of his criminal conduct even after serving multiple prison terms, demonstrate that defendant has not altered his conduct, repeatedly placing others in fear and at risk and by his own conduct in escalating thefts to robberies.

II. The Matter Must Be Remanded for Resentencing Under SB 1393

Defendant contends, and the Attorney General concedes, that the matter must be remanded for resentencing pursuant to SB 1393 to permit the trial court to exercise its discretion to strike or dismiss the prior serious felony conviction for sentencing purposes. We agree.⁵

Pursuant to section 667, subdivision (a), defendant's sentence included a five-year enhancement for a prior serious

⁵ We filed our original opinion in this case on August 14, 2018, before SB 1393's enactment. On December 18, 2018, defendant filed a motion to recall remittitur and reinstate the appeal on the basis that he is entitled to resentencing under SB 1393. For good cause shown, we granted the motion, vacated our original opinion, and asked the Attorney General to address defendant's request that we remand the case for resentencing under SB 1393. The Attorney General indicated he does not object to the case being remanded for that purpose.

felony conviction. At the time defendant was sentenced, the trial court was required to impose a five-year consecutive term for “[a]ny person convicted of a serious felony who previously has been convicted of a serious felony.” (§ 667, subd. (a)(1).) The court had no discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (Former § 1385, subd. (b).) SB 1393, effective January 1, 2019, amended section 667, subdivision (a), and section 1385, subdivision (b), to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.)

When a statute is amended to either lessen the punishment for a crime or provide the trial court discretion to do so, absent evidence to the contrary and as a matter of statutory construction, courts may infer that the Legislature intended the statute to apply retroactively in all cases that are not final when the statute becomes effective. (*In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*) [absent evidence of contrary legislative intent, “[i]t is an inevitable inference” that the Legislature intends ameliorative criminal statutes to apply to all cases not final when the statutes become effective]; *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307–308 & fn. 5; see *People v. Francis* (1969) 71 Cal.2d 66, 76 “[T]here is such an inference because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.”]; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–507 [“Retrospective application of a new penal statute is an exception to the general rule set forth in section 3, which bars retroactive application of new Penal Code

statutes unless the Legislature has expressly provided for such application.”].) Under *Estrada* and its progeny, we may thus infer that SB 1393, which gives the sentencing judge wider latitude in tailoring a sentence to fit the particular circumstances, applies retroactively to all nonfinal cases. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [inferring the Legislature intended SB 1393 to apply to all nonfinal cases].)

Here, defendant’s case was not final when SB 1393 took effect on January 1, 2019. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 “[A] defendant generally is entitled to benefit from amendments that become effective while his case is on appeal.”]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 “[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired”]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 “[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it”). Accordingly, the trial court must be given the opportunity to consider whether to strike or dismiss defendant’s serious felony enhancement. In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subd. (c).) We remind the court to consider the factors specified in California Rules of Court, rule 4.428(b), in making its determination.

DISPOSITION

The matter is remanded to the trial court with directions to resentence defendant pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by SB 1393. The judgment is affirmed in all other respects.

BIGELOW, P. J.

We concur:

GRIMES, J.

WILEY, J.